UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

HENLEY FINANCE, LTD.,

Plaintiff,

v.

GOYETTE & ASSOCIATES, INC., a California corporation; BIOSCIENCE ENTERPRISES, INC., a California corporation; and DOES 1 THROUGH 20, inclusive,

Defendants.

No. 2:20-cv-01834-DJC-KJN

ORDER DENYING MOTION FOR SUMMARY JUDGMENT

This case arises from a disputed loan transaction involving CBD products in 2019 between two companies: Plaintiff Henley Finances, Ltd. ("Henley"), which was founded by Richard Butler; and Defendant Bioscience Enterprises, Inc. ("Bioscience"), whose President and authorized agent is Richard Parker. This suit concerns a transaction involving money that was transferred from Henley to Bioscience, in which Bioscience's lawyer, Paul Q. Goyette and his law firm ("Goyette") was the intermediary. Regarding the claims against Goyette, Henley alleges that Goyette held the money in escrow, and that he breached several duties owed to Henley, including by disbursing the funds to his client, Bioscience, without authorization and by failing to disclose the status of the funds. Goyette now moves for summary judgment, arguing that an

escrow was never created, and that he is thus entitled to judgment as a matter of law. For the reasons set forth below, the Court DENIES Goyette's Motion for Summary Judgment (ECF No. 35), concluding that a reasonable jury could find that an escrow was created and that Plaintiff is therefore entitled to relief.

BACKGROUND

I. Factual Background

A. Henley Explores the CBD Industry

In January 2019, Henley was looking to invest in the CBD industry. (*See* Compl. (ECF No. 1) ¶ 8 .) Around the same time, Goyette entered into a Fee Agreement with Bioscience to provide transaction services, litigation services, and escrow services. (*See* Decl. of Thomas Rivera in [ ] Supp. of Goyette's Mot. for Summ. J. ("Rivera Decl.") Ex. 10 (ECF No. 35-4 at 166–212), at 37–44 (providing a copy of the 1/14/2019 Fee Agreement).)

In March 2019, Robert Kay, Henley's agent at the time, entered into an agreement with another company called Commodity Clearinghouse Corporation or "C3." (*See* Rivera Decl. Ex. 9 (ECF No. 35-4 at 135–42), at 3–10 (providing a copy of the 3/12/2019 hemp trade agreement between C3 and Kay).) This agreement between C3 and Robert Kay contemplated escrow services that involved Goyette's firm and used Goyette's IOLTA (interest on lawyer trust account) to hold money for future CBD transactions. (*See* Decl. of Michael J. Aguirre in Supp. of Henley's Opp'n to Goyette's Mot. for Summ. J. ("Aguirre Decl.") Ex. 14 (ECF No. 40-6 at 30–33), at 1–2 (providing a copy of an email from Goyette explaining the process).)

B. Henley Enters into the Henley-Bioscience Loan Agreement

Subsequently, on July 2, 2019, Henley (through Butler) and Bioscience (through Parker) agreed that Henley would give $1.25 million "in the form of a Direct Loan for the Use of Bioscience business operations, and to conduct the trade of Hemp derived CBD isolate." (Aguirre Decl. Ex. 1 (ECF No. 40-5 at 1–3) [hereinafter Henley-Bioscience Loan Agreement or 7/2/2019 Henley-Bioscience Loan Agmt.].) In return, the Henley-

Bioscience Loan Agreement states that "Bioscience agrees to return the Loan Principal ($1,250,000) and Fifty Percent (50%) of the Gross Margin from any Hemp CBD Buy/Sell Transaction that involves funds from the Loan Principal by Lender." (7/2/2019 Henley-Bioscience Loan Agmt. at 1.) "In any case the principal and any related fees will be returned to Lender No Later Than September 3, 2019." (*Id.*)

Rather than directly sending the money to Bioscience, Henley wired the funds into Goyette's lawyer trust account. Although Goyette denies knowledge of any agreement between Henley and Bioscience, the use of Goyette's trust account appears to have been based on the earlier C3 transaction. (*See* Henley's Opp'n to Goyette's Mot. for Summ. J. (ECF No. 40) 13 [hereinafter Opposition or Opp'n] (citations omitted); Dep. of Robert Kay 21:2–25 [hereinafter Kay Dep. Tr.] (explaining that Goyette previously offered escrow services for the C3 transaction); Dep. of Richard Parker 34:1–35:9 [hereinafter Parker Dep. Tr.] (explaining that it was his understanding that Henley's loan money would "be placed in a trust account with Goyette" because Bioscience, through Parker, "told them that we had used - - that we used Goyette[ ]").) Important for resolving the Motion for Summary Judgment are seven communications involving the principal actors that provide context to Henley's $1 million wire to Goyette for the "Direct Loan" to Bioscience.

1. The July 9th Communications: The Day Before the Wire

[**1**] On July 9, 2019, around 8:00 PM Pacific Standard Time ("PST"), Parker, Bioscience's President; Butler, Henley's Founder; and Kay, Henley's agent, exchanged emails regarding an "Update" to how the loan would be funded. (*See* Rivera Decl. Ex. 9 (ECF No. 35-4 at 148–49), at 16–17 (providing a copy of the 7/9/2019 email from Parker to Kay, copying Butler).) Henley and Bioscience agreed that Henley would immediately send one payment of $625,000, "with the balance to be confirmed in the next few days . . . to show proof of funds." (*Id.*) They also agreed to "review the account status in the morning and take it from there." (*Id.*)

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[**2**] Then, at 10:07 PM PST, Bioscience (through Parker) emailed Goyette. (*See* Aguirre Decl. Ex. 7 (ECF No. 40-6 at 1–2) (providing a copy of the 7/9/2019 emails between Parker and Goyette).) Parker informed Goyette that two wires of $625,000 from outside accounts would be coming from a loan the next day. (*See id.*) Parker also provided instructions for Goyette to: (a) immediately wire $600,000 to Bioscience's account; (b) pay outstanding fees related to another litigation; and (c) pay himself (Goyette) a fee. (*See id.*) Goyette confirmed receipt of the email 18 minutes later, stating that he would look for the transaction in the morning. (*See id.*)

2. The July 10th Communications: The Day of the Wire

[**3**] The next morning, Kay followed up on his prior email to "review the account status in the morning and take it from there." (*See* Rivera Decl. Ex. 11 (ECF No. 35-4 at 213–14) (providing a copy of the 7/10/2019 email from Kay to Bioscience).) Kay emailed Bioscience and Parker at 2:44 PM when he was in London (6:44 AM PST) about some "Housekeeping" issues. (*Id.*) Kay mentioned creating a "clear plan to execute and address" a "Letter to order from Goyette for RB funds" and a "Cash flow for RB $1m[.]"[1] (*Id.*)

[**4**] Later, Goyette noticed the nearly $1 million in his lawyer trust account, which he stated "surprised" him and prompted him to begin calling his clients until he reached Parker, Bioscience's President. (*See* Mem. of P. and A. in Supp. of Def.'s Mot. for Summ. J. (ECF No. 35-1) 6 [hereinafter Motion or MSJ] (quoting Decl. of Paul Q. Goyette in [ ] Supp. of Goyette's MSJ (ECF No. 35-5) ¶ 8 [hereinafter Goyette Decl.]).) During this phone call, Parker told Goyette that the $1 million belonged to him, and again gave Goyette instructions to disburse the money. (*See* Dep. of Paul Q. Goyette 29:15–30:13, 108:10–25 [hereinafter Goyette Dep. Tr.].) According to Goyette, "[a]t no time did Mr. Parker tell [Goyette] that [he] needed the approval of anyone else to disburse the funds." (Goyette Decl. ¶ 9.)

[1] For purposes of this Motion, the Court assumes that "RB" was an abbreviation for Richard Butler, Henley's Founder.

[**5**] Sometime after this call, Goyette emailed Bioscience's Parker to confirm that he tried transferring $600,000 at 11:15 AM PST to Bioscience's account, and that he otherwise disbursed the funds and assessed a fee. (*See* Aguirre Decl. Ex. 13 (ECF No. 40-6 at 26–29), at 1–2.) Goyette assessed an "Escrow fee of $5000 (50 basis points of the $1 million)[,]" consistent with the fee stipulated in the Goyette-Bioscience Fee Agreement. (Aguirre Decl. Ex. 13, at 2; *see also* Rivera Decl. Ex. 10, at 38 ("Fees for Escrow Services described above shall be described in the Escrow Engagement documents and, unless otherwise agreed by the Parties, shall be .05% of total monies deposited into Escrow.").)

3. The July 11th Communications: The Day After the Wire

[**6**] The next day, on July 11th, at 9:47 AM PST (5:47 PM in London), Kay emailed Henley's Founder, Butler, an "Update" that the funds were "visible at Wells Fargo . . . [,]"and that "Paul Goyette will do the 'Letter to Henley Finance Order[.]'" (Aguirre Decl. Ex. 12 (ECF No. 40-6 at 24–25) (providing a copy of the 7/11/2019 email from Kay to Henley).) Kay testified that this letter was supposed to be "from Mr. Goyette specifically stating that nothing will leave his client's account, which we are to believe was Richard Butler's account, without his order, without his instruction." (Kay Dep. Tr. 67:11–14.) Kay also testified that "at his time, [they] still didn't have the – the letter from Mr. Goyette, which had been requested, stating that everything would be to Richard Butler's order." (*Id.* 66:24–67:2.)

[**7**] Finally, at 11:09 AM PST (7:09 PM in London), Kay had about a six-minute phone call with Goyette. (*See* Compl. ¶ 24; Kay Dep. Tr. 22:2–25.) The parties hotly contest what transpired on the call, but according to Kay, Goyette confirmed to Kay that the funds were received and acknowledged the instruction "stipulated" to Bioscience that no funds be disbursed without the permission of Henley through Butler [hereinafter the preauthorization instruction]. (*See* Kay Dep. Tr. 22:2–25.) Goyette, however, declared that he does "not recall having this discussion [with Kay on July 11, 2019], nor do[es] [he] recall receiving any instructions from Mr. Kay

regarding any Henley funds." (Goyette Decl. ¶ 10.) Kay also testified that he does not recall what Goyette said on the conversation, but he did "recall that [the preauthorization instruction and escrow] was received with acknowledgment[,]" and that he believed that Goyette fully understood the request and "acknowledged the undertaking . . . ." (Kay Dept. Tr. 23:1–9.)

4. The July 16th Transfer: Most of the Funds Are Gone

Several days later, on July 16th, Bioscience's President, Parker, instructed Goyette to send $378,000 to a supplier called CETC under a contract that Bioscience had negotiated and for which Bioscience had requested Goyette's assistance. (*See* MSJ 6–7 (citations omitted); Aguirre Decl. Ex. 10 (ECF No. 35-4 at 180–91), at 14–25 (providing a copy of the CETC-Bioscience Supply Agreement).) By this time, most of Henley's nearly $1 million (at least $978,000 out of the $999,950) was gone and disbursed from Goyette's IOLTA.

C. Henley's Attempts to Retrieve the Funds

By the terms of the Henley-Bioscience Loan Agreement, the principal and any related fees were due no later than September 3, 2019. (*See* 7/2/2019 Henley-Bioscience Loan Agmt. at 1.) Throughout July and August, there were several communications between Henley and Bioscience, including an "estimated timeline" of "anticipated returns" on August 20, 2019. (MSJ 7 (citation omitted).) The proposed timeline stated that Henley would receive a payment by the end of August. (*See id.* 8.)

On August 28th, Henley's Founder, Butler, emailed Goyette about the "Return of Funds." (*See* Aguirre Decl. Ex. 16 (ECF No. 40-6 at 43–45), at 1 (providing a copy of the 8/28–8/29/2019 emails between Butler, Goyette, and Parker).) In the email, Butler told Goyette that "Richard Parker has informed me he has instructed you to make a wire transfer to my Henley Finance business account for $1,100,000. Please can you confirm when this will be executed and supply a proof of payment for my records." (*Id.*) Goyette responded on August 29th, where he stated that he had "not heard from

my client Mr. Parker on this transaction yet," but assured Butler that he would "be in touch" once he spoke to Parker. (*Id.*)

On September 6th, Henley's Founder, Butler, emailed Goyette. (*See* Aguirre Decl. Ex. 17 (ECF No. 40-6 at 46–47) (providing a copy of the 9/6/2019 email from Henley's Butler to Goyette.) Butler asked Goyette to "confirm how much you are holding on account for me, and do not release any funds, as discussed on the telephone without my consent please." (*Id.*) That same day, Bioscience's President, Parker, sent an email to Goyette and copied Butler about the "Usage of Funds." (*See* Aguirre Decl. Ex. 18 (ECF No. 40-6 at 48–49) (providing a copy of the 9/6–9/7/2019 emails between Goyette, Butler, and Parker).) Parker instructed Goyette "that no funds of Richard Butler or Henley Finance are to be used without the express written authorization of Richard Butler himself. No party from BioScience shall be authorized to access that capital in any matter." (*Id.*) Goyette responded on September 7th, indicating his understanding. (*See id.*) Goyette also discussed opening a separate lawyer trust account for Henley. (*See id.*) Goyette does not appear to have informed Mr. Butler or any agent of Henley that, in fact, the funds had already been spent. (*See* Opp'n 23 (citing Goyette Dep. Tr. 120:7–13).)

Also on September 7th, Kay emailed Bioscience and Henley about "a $1m problem that we all have a responsibility to preserve." (Rivera Decl. Ex. 9 (ECF No. 35-4 at 156–57), at 25 (providing a copy of the 9/7–9/8/2019 emails between Goyette, Kay, Henley, and Bioscience).) Parker responded the next day, revealing that some CBD products and materials purchased for the July 16th CETC transaction were "not going to pass future tests, [and] the man we purchased it from is more than likely a fraud and is not going to have the funds for immediate return as a result. This means regardless of the outcome BioScience is still responsible for all funds." (*Id.*)

Soon after, on September 10th, Henley, through Butler, asked Goyette about securing the funds because he had not "had any correspondence regarding these deals as promised in the agreement[,]" and because Bioscience had "problems with

the last deal . . . ." (Rivera Decl. Ex. 9 (ECF No. 35-4 at 165), at 33 (providing a copy of the 9/6–9/10/2019 emails between Butler, Goyette, and Parker).) Following this, the record indicates that the relationship between the parties soured as Henley sought repayment. (*See* MSJ 8 (citing an email Butler sent Goyette on 2/13/2020 where Butler asked about finding a "productive way" for Bioscience to repay the money).)

II. Procedural Background

Henley filed the Complaint on September 11, 2020. (See Compl. 12.) Goyette filed the instant Motion on May 30, 2023 seeking to dismiss the two causes of action against him; Bioscience is not a party to this Motion. (*See* MSJ (ECF No. 35).) The Court heard arguments on the Motion on August 18, 2023, where Attorney Andrew Stroud appeared for Goyette and Attorneys Michael Aguirre and Maria Severson appeared for Henley. (*See* ECF No. 42.) At the conclusion of the hearing, the Court offered the parties the opportunity to file supplemental briefing on whether an attorney may, consistent with any ethical and legal obligations, charge a fee for disbursing proceeds from a loan that was deposited into the attorney's trust account. (*See id.*) Henley and Goyette filed supplemental briefing on August 24, 2023. (*See* ECF Nos. 44–45.) The Motion is now fully briefed.

DISCUSSION

I. Legal Standard

The Federal Rules of Civil Procedure provide for summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). One of the principal purposes of Rule 56 is to dispose of factually unsupported claims or defenses. *Celotex*, 477 U.S. at 325. Therefore, the "threshold inquiry" is whether "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party[,]" or, conversely, "whether it is so one-

sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52 (1986). But "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Id.* at 247–48. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

In a summary judgment motion, the moving party always bears the initial responsibility of informing the court of the basis for the motion and identifying the portion of the record "which it believes demonstrates the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. If the moving party meets its initial responsibility, the burden then shifts to the opposing party, which "must establish that there is a genuine issue of material fact . . . ." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574. 585 (1986). To meet its burden, either party must "(A) cit[e] to particular parts of materials in the record, . . . or (B) show[ ] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

For the opposing party to succeed and avoid summary judgment, the party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. The opposing party must put forth more than "a scintilla of evidence in support of the [party's] position . . . ." *Anderson*, 477 U.S. at 252. Rather, the opposing party must produce enough evidence such that "the 'specific facts' set forth by the nonmoving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on the evidence." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, for the moving party to succeed, the Court must conclude that no rational trier of fact could find for the opposing party. *Matsushita*, 475 U.S. at 587. However, so as not to "denigrate the

role of the jury[,]" "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions," and so the Court draws all reasonable inferences and views all evidence in the light most favorable to the opposing party. *Anderson*, 477 U.S. at 255; *see Matsushita*, 475 U.S. at 587–88.

II. Analysis

Because Henley wired money to Goyette's lawyer trust account, Henley argues that an escrow arose that included the specific oral instruction that no money be disbursed from Goyette's lawyer trust account without Henley's permission (the preauthorization instruction). (*See* Opp'n 5–8, 14.) In contravention of this alleged instruction, however, Bioscience executed several transactions that used the money Henley sent Goyette without preauthorization. (*See* Goyette's Resp. to Henley's Additional Statement of Undisputed Material Facts Re: Goyette's MSJ (ECF No. 41-1), at 20, 22–27 (providing Henley's 38th and 43rd through 50th statements of facts that are all disputed).) These subsequent transactions using Henley's money give rise to the first and third causes of action against Goyette for conversion of the funds and breach of fiduciary duties, respectively. (*See* Compl. ¶¶ 32–34 (first cause of action for conversion against Goyette); *id.* ¶¶ 41–46 (third cause of action for breach of fiduciary duty against Goyette).) Goyette counters, however, arguing that he never agreed to be the deposit-holder of the escrow and that he was unaware of any instruction that the funds not be disbursed without Henley's authorization. He points to the transactions complained of by Henley and the communications related to them as evidence that there was never a preauthorization instruction and that Henley and Butler consented to the use of any of these funds. (*See* Reply Mem. of P. and A. in Supp. of Goyette's MSJ (ECF No. 40) 1–2 [hereinafter Reply].)

For purposes of summary judgment, this case comes down to three basic questions: (1) whether a jury can find that – before Henley wired the funds– Bioscience and Henley had the mutual understanding that any escrow transaction with Henley's money would include the preauthorization instruction; (2) and if so, whether

Goyette knew of and consented to the terms of the escrow and being the escrow holder, and (3) whether Goyette violated any duties arising from the contemplated escrow transaction. As explained below, there is sufficient evidence to show that a mutual understanding between Bioscience and Henley was established regarding the preauthorization instruction before the funds were wired to Goyette. *See infra* Part II.A.1. In addition, there is direct and indirect evidence in the record from which a jury could find that Goyette accepted the role of deposit-holder and escrow agent and that Goyette knew that Henley deposited the money and intended to create the escrow pending further instructions. *See infra* Part II.A.2. A reasonable jury could further find that Goyette breached fiduciary duties owed to Henley by failing to disclose the status of the funds held inside the escrow. *See infra* Part II.B. Finally, in light of the above and additional circumstantial evidence in the record, a jury could find that Henley did not consent to or ratify the funds being disbursed outside of an escrow account pending further instruction. *See infra* Part II.C.

A. Henley Provides Sufficient Evidence Regarding the Escrow

Although Goyette disputes whether an escrow arose (*see, e.g.*, Reply 1), each of the other parties involved, Bioscience's Parker, Henley's Butler, and Robert Kay, all agreed and testified that an escrow in Goyette's lawyer trust account would be used to hold the $1 million from Henley. (*See* Opp'n 12–13.[2]) Therefore, the fundamental issue in this case is whether an escrow with the preauthorization instruction was contemplated between Henley and Bioscience.

The preauthorization instruction is key to resolving the issues before the Court. If the preauthorization instruction was part of the mutual understanding between

[2] (*See also* Parker Dep. Tr. 198:10–200:24 ("Q: No. But you understood in your discussions at least with Mr. Butler that there was an understanding that Goyette would provide the escrow services for the Henley money." A: Yes."); Butler Dep. Tr. 49:7–16 ("Rob Kay had been through this similar business with Bioscience, and we were just following the same process that he went through when he did his business with Bioscience."); *id.* 75:21–76:2 (same); Kay Dep. Tr. 54:20–56:24 ("The – the one point that we constantly referenced was the escrow account, that it had to be under a protected - - protected status, legally protected status. We weren't going to just send him the money to do what he wanted to do. That was absolutely sacrosanct at the time of that conversation.").)

Henley and Bioscience for the Loan Agreement, and Goyette was aware of this instruction, then the preauthorization instruction changes the nature of the transaction from a loan to an escrow. Regarding the third cause of action for breach of fiduciary duty, it is the existence of an escrow that gives rise to fiduciary duties in the first instance, including the duty to disclose information. Second, regarding the first cause of action for conversion, the claim is based on Goyette and Bioscience using the money without proper authorization; if it was a mere loan, Henley would not have had a right to immediate possession of the funds.

"An escrow involves the deposit of documents and/or money with a third party to be delivered on the occurrence of some condition." *Summit Fin. Holdings, Ltd. v. Cont'l Lawyers Title Co.*, 27 Cal. 4th 705, 711 (2002) (citing 2 Miller and Starr, *Cal. Real Estate Procedure and Practice* Ch. 6 Escrows § 6:1 (4th ed. June 2023 Update) [hereinafter Miller and Starr, Escrows]; Cal. Fin. Code § 17003(a)). "An escrow holder is an agent and fiduciary of the parties to the escrow." *Id.* (citing *Amen v. Merced Cnty. Title Co.*, 58 Cal. 2d 528, 534 (1962); *Rianda v. San Benito Title Guar. Co.*, 35 Cal. 2d 170, 173 (1950)). "The agency created by the escrow is limited . . . to the obligation of the escrow holder to carry out instructions of each of the parties to the escrow." *Summit*, 27 Cal. 4th at 711 (citations omitted). The escrow holder is liable for the failure to follow instructions. *See id.* (citing *Amen*, 58 Cal. 2d at 532). "Absent clear evidence of fraud, an escrow holder's obligations are limited to compliance with the parties' instructions." *Id.* (citing *Lee v. Title Ins. and Trust Co.*, 264 Cal. App. 2d 160, 162 (1968); Miller and Star, Escrows § 6:26).

The limited agency theory of an escrow is what gives rise to Goyette's potential liabilities, which requires differentiating what those duties are and when they arise. There are three key moments in an escrow, each creating different obligations between the parties (the promisor and promisee) and the agent (the escrow holder).

First, there is the moment when a binding contract arises between the promisor and the promisee. If there is no binding contract between the promisor and the

promisee before the promisor transferred the documents and/or money into the deposit-holder's account, the deposit-holder is an "intermediary [and] an agent" of the party that transferred the item "whose power can be revoked or changed at the will of the one who has appointed [the agent]." *Restatement (2d) of Agency* § 14D Reporter's Notes (1958) (May 2023 update); *Holland v. McCarthy*, 173 Cal. 597 (1917) (citing *Cannon v. Handley*, 72 Cal. 133, 144 (1887)).

Second, there is the delivery of the documents and/or money into the deposit-holder's account, at which point the items held in the escrow become irrevocable. At this point, the deposit-holder is, "prior to the performance of the conditions of the escrow, the agent of both parties thereto[.]" *Shreeves v. Pearson*, 194 Cal. 699, 707 (1924) (citing *Cannon*; *McDonald v. Huff*, 77 Cal. 279 (1888)); *see* The Rutter Group, *Cal. Prac. Guide: Real Property Transactions* ¶ 4581:5 (Sept. 2022 Update) [hereinafter Rutter Group, Use of an Escrow] (citations omitted) (same); *Restatement (2d) of Agency* § 14D Comment a (same); Miller and Starr, Escrows § 6:11 (same). That is, prior to the completion of the escrow instructions (commonly called the close of escrow), the escrow holder owes independent obligations to parties to the escrow. The duties an escrow holder owes to both principals, though more limited than similar duties for general agents, includes the duty to disclose information that is: (1) acquired by the escrow holder in the escrow in which both principals are parties, and (2) is "specific material information pertinent to matters within the same escrow that could have a substantial adverse effect on the principal . . . ." *In re Marriage of Cloney*, 91 Cal. App. 4th 429, 440 (2001) (citing, among other sources, Miller and Starr, Escrows §§ 6:23, 6:26); *see* Miller and Starr, Escrows § 6:13 (same); Rutter Group, Use of an Escrow ¶ 4:582.5. *But see* Rutter Group, Use of an Escrow ¶ 4:645.1 (limiting the duty to disclose to when the escrow holder knows that a party to the escrow is relying on it for protection as to facts learned by the escrow holder).

Finally, but not relevant here, there is the close of escrow, when the instructions have been completed or have failed to be completed within the time specified. At

this point, the agent's role is limited to the rights that each party has to the items in the escrow. *See Shreeves*, 194 Cal. at 707; Rutter Group, Use of an Escrow ¶ 4:581.6 (same); *Restatement (2d) of Agency* § 14D Comment b (same); Miller and Starr, Escrows § 6:26 (same); *also* Miller and Starr, Escrows § 6:25 (discussing the rights of the parties to the items held in the escrow upon no performance by either party and full performance by either or both parties).

1. Henley Can Establish a Mutual Understanding Regarding the Preauthorization Instruction Before the Funds Were Wired

Goyette first argues that the preauthorization instruction was not part of the Henley-Bioscience Loan Agreement and therefore is not part of the contract between Henley and Bioscience. (*See* MSJ 1, 12–15; Reply 10 and n.5; Goyette Decl. ¶ 9.) However, Henley, mostly through Henley's agent, Robert Kay, provides evidence from which a reasonable jury could find that Henley established a mutual understanding with Bioscience regarding the preauthorization instruction on the morning of July 10, 2019, before the $1 million were wired to Goyette and before Goyette disbursed the funds. Kay emailed Parker and other members of Bioscience on July 10th about "Housekeeping," where he mentioned a "Letter to order from Goyette for RB funds" and a "Cash flow for RB $1m[.]" (Rivera Decl. Ex. 11.) Henley then points to a July 11th email from Kay to Butler about an "Update" that mentions that "Paul Goyette will do the Letter to Henley Finance Order[,]" which was a letter meant to memorialize the preauthorization instruction. (Aguirre Decl. Ex. 12.) The July 10th and July 11th emails seem similar enough in content (both discussing the $1 million and a letter from Goyette regarding those funds) to permit an inference that the two letters involve the same matter, and Kay testified that the July 11th email was about an outstanding letter to memorialize the preauthorization instruction. (*See* Kay Dep. Tr. 66:24–67:2.) Kay also testified that he received the information contained in the July 11th email from Parker. (*See id.* 64:7–69:15 (explaining that "this information was given to me by Parker" but stating that only the information regarding the funds being visible and in

the account was given).) Finally, while the Loan Agreement does not contain the preauthorization instruction, it does reference a requirement that Bioscience will provide "Escrow balance summaries for each transaction" (7/2/2019 Henley-Bioscience Loan Agmt. at 2), consistent with this evidence. Therefore, a jury can reasonably find that there was a mutual understanding regarding the preauthorization instruction between Henley, through Butler, and Bioscience, through Parker, based on these emails with Kay, as well as Kay's deposition testimony.

2. A Jury Can Find That Goyette Assented to An Agency

Goyette's principal contention is that no escrow existed because he never accepted the role as the depositor-holder of the escrow. (*See, e.g.*, Reply 3–6.) Escrows are contractual in nature. *See* Rutter Group, Use of an Escrow ¶ 4:573 ("Escrow transactions are *contractual* in nature and, so, cannot be created without the agreement of seller, buyer and escrow holder."). Like any other contract, escrows require mutual assent or understanding between the contracting parties. *See, e.g.*, *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (collecting cases from California to apply California state law).

Under California law, mutual consent or assent "is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe." *Monster Energy Co. v. Schechter*, 7 Cal. 5th 781, 789 (2019) (citation omitted). California courts have held that mutual assent may be manifested by written or unspoken words, or by conduct, and acceptance of contract terms may be implied through action or inaction. *See Knutson*, 771 F.3d at 565 (citations omitted). Therefore, "an offeree, knowing that an offer has been made to him but not knowing all of its terms may be held to have accepted by his conduct, whatever the terms the offer contains." *Knutson*, 771 F.3d at 565 (citations omitted).

Here, Goyette does not dispute that he accepted the $1 million deposit from Henley, instead arguing that Henley provides no evidence to prove Goyette accepted

the role. (*See* Reply 4–6.) However, Henley provides both circumstantial and direct evidence from which a reasonable jury could find that Goyette objectively assented to being an agent for the contemplated escrow transaction. For direct evidence, Henley points to the July 10th email from Goyette to Parker where, after disclosing that the earlier $1 million incoming wire was still pending, Goyette stated: "In addition, from those monies I will assess three fees or invoices as follows: 1. Escrow fee of $5000 (50 basis points of the $1 million). . . ." (Aguirre Decl. Ex. 13.) Goyette did in fact take an escrow fee of $5,000, which used the calculation stipulated in Goyette's Fee Agreement with Bioscience. (*See* Opp'n 15; Rivera Decl. Ex. 3 (ECF No. 40-5 at 20–34), at 2, 10 (providing copies of the Fee Agreements between Goyette and Bioscience that state that "Fees for Escrow Services described above shall be . . . .05% of total monies deposited into Escrow[ ]").)

Henley also points to the fact that the Fee Agreements contain a clause expressly excluding any legal services not provided for in the contract, and the contract only provides for three types of services: (1) transactional services; (2) litigation; and (3) escrow services. (*See* Opp'n 15; Rivera Decl. Ex. 3, at 1, 6, 8–9.) If the contract excludes all other services such that the only services provided are transactional, litigation, and escrow services, then the only plausible explanation according to Goyette's own contract is that he provided escrow services. This is further supported by Goyette's own declaration where he revealed that he "played no role in negotiating the Henley-Bioscience loan or drafting the Henley-Bioscience Loan Agreement[,]" therefore precluding the only plausible alternative explanation of charges for transactional services. (Goyette Decl. ¶ 6; *see* Reply 1, 3, 11.[3])

[3] At oral argument, counsel for Goyette observed that the Fee Agreement also required specific documents be executed for any escrow services, which did not happen. The suggestion is that if Henley relies on one portion of the fee agreement (the exclusive list of services provision), then it must rely on the entirety of the agreement (which would also include the escrow documents). This is a fair point, but one that would go to the weight a jury would give these respective facts.

Furthermore, Kay testified that when he called Goyette on July 11, 2019, he did so to "corroborate" information Parker gave to Kay, which included discussing the "Letter to Henley Finance Order" referred to in the July 10th and July 11th emails mentioned earlier. (*See* Kay Dep. Tr. 64:7–68:6.) Kay further testified that, at the time of his call with Goyette, he was aware of the $1 million being sent to Goyette's "escrow account[,]" and stated that "[i]t was stipulated to Richard Parker in unequivocal terms that that money was to go nowhere and not be released without [Henley's] permission, and that was confirmed verbally." (*Id.* 22:6–12.) That is, Kay testified to having all of the knowledge required to know that Henley and Bioscience created an escrow.[4]

Although Goyette declared that he does not recall having this discussion and does not recall receiving any instructions from Kay (*see* Goyette Decl. ¶ 10), Kay's testimony indicated otherwise. Faced with conflicting evidence, the Court must take the non-movant's evidence because it will be for a jury to decide whether to find Kay's testimony more credible. *See, e.g.*, *Eisenberg v. Ins. Co. of N. Am.*, 815 F.2d 1285, 1288–89 (9th Cir. 1987) (citation omitted). Therefore, a jury could find that Goyette was aware of the escrow's preauthorization instruction at least as of July 11, 2019.

Goyette further argues that he did not know that the funds belonged to or came from Henley, so he cannot be an agent for Henley. (*See* MSJ 5–6, 12; Goyette Dep. Tr. 30:18–25; *id.* 119:25–120:13.) But, as Henley points out, "Goyette noted 'Henley' in its wire transfer of Henley's funds to Bioscience that day[.]" (Opp'n 1; *also* Aguirre Decl. Ex. 10 (ECF No. 40-6 at 7–10), at 3 (providing a copy of the receipt for the funds from Wells Fargo that lists "Henley Finan" as the third-party reference); Aguirre Decl. Ex. 22 (ECF No. 40-7 at 1–3), at 1 (providing a copy of Goyette's lawyer trust account summary that shows "Henley Finance Limited" listed under the $1 million

[4] Given the state of the evidence, it is possible that a jury could find that while Goyette was unaware of the preauthorization instruction before the July 11th phone call with Kay, at which time he had already disbursed over $600,000 in funds, he was aware of the instruction following that call. This would go to the question of damages, however, not liability.

wire on 7/10/2019).) In addition to this direct evidence, Henley points to the March 2019 C3 transaction with Kay that used Goyette's IOLTA as an escrow and the April 2019 Spyker bonds conversation with Butler that contemplated using Goyette's IOLTA as an escrow as indirect evidence that Goyette knew or should have known that it was Henley that deposited the funds into his IOLTA with the intent to create an escrow.

Goyette also tries to argue that any conflicts arising from the contemplated escrow transaction would necessarily conflict with the duties he owes to his client, Bioscience, thereby apparently absolving him of any liability. (*See, e.g.*, Mot. 17–18; Reply 7, 9–11.) While it may be true that Goyette's actions gave rise to a potential conflict, at most that shows that he *shouldn't* have accepted the escrow, not that he *didn't.* Attorneys, unfortunately, sometimes fall short of their ethical obligations, and California courts have recognized that a cause of action for breach of fiduciary duties as an escrow holder may arise against an attorney – despite the attorney representing the client/adverse party, as here. *See Wasmann v. Seidenberg*, 202 Cal. App. 3d 752, 757 (1988); 1 Witkin, *California Procedure* Ch. I Attorneys § 324 (6th ed. March 2023 Update).

To summarize: (1) a jury can find that Henley and Bioscience established a mutual understanding regarding the preauthorization instruction as of the morning of July 10, 2019, before the $1 million were wired to Goyette's lawyer trust account, and (2) a jury could further find that Goyette was aware that Henley deposited the money and intended to create an escrow as of July 10, 2019 and that Goyette assented to accepting any agency arising from the deposit and escrow.

B. A Jury Could Find That Goyette Breached Duties to Disclose Material Information Regarding the Status of the Funds

Having found that a reasonable jury could find that an escrow was created by the parties, the question remains of whether there is sufficient information to establish that Goyette breached a duty arising from the escrow. The Court concludes there is. Breach of any duty is a factual question left for the jury. *See Spaziani v. Millar*, 215 Cal.

App. 2d 667, 683–84 (1963); *Diaz v. United Cal. Bank*, 71 Cal. App. 3d 161, 169–70 (1977). Having found that an escrow arose and that the escrow created duties owed by Goyette to Henley, a reasonable jury could conclude that Goyette violated the duty to strictly comply with the preauthorization instruction. *See Spaziani*, 214 Cal. App. 2d at 682. Moreover, an escrow agent has a duty to disclose information regarding documents and instructions held inside the escrow that arises from the right of each party to the escrow to see all documents, instructions, and items within the escrow. *See Cloney*, 91 Cal. App. 4th at 440 and n.10 (citations omitted); Miller and Starr, Escrows § 6:13 and n.12 (collecting cases); *id.* § 6:28 and n.14 (collecting cases). A jury could find that Goyette failed to disclose the status of the funds (their non-existence) to Henley in the August and September emails after the $1 million was disbursed from the escrow, in violation of this obligation. (*See* Opp'n 13.)

For the reasons set forth above, the Court DENIES Goyette's Motion for Summary Judgment on Henley's third cause of action for breach of fiduciary duties.

C. A Jury Could Find Goyette Converted Henley's $1 Million

Conversion under California law requires a plaintiff to show: "(1) she possessed property, (2) the defendant disposed of the property in a manner inconsistent with the plaintiff's property rights, and (3) damages." *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1038 (9th Cir. 2016) (citing *Lee v. Hanley*, 61 Cal. 4th 1225, 1240 (2015)). The Ninth Circuit has held that a conversion claim arises where: (1) an attorney transfers funds without authorization, and (2) the owner identifies a specific sum of money. *Id.* (citing *Virtanen v. O'Connell*, 140 Cal. App. 4th 688, 707–08 (2006)).

Goyette first argues that there is no right to immediate possession if there is no escrow. (*See* MSJ 19–23; Reply 12–13.) As stated above, however, there is enough evidence to find that an escrow arose, which Goyette concedes is enough to provide the right to immediate possession. (*See* MSJ 21; *also* Opp'n 22.)

Goyette's alternative argument opposing the conversion claim is that Henley implicitly or explicitly consented to the use of the funds and knew about the funds

being used. Goyette points to the July 10th email where Kay (Henley's agent) states that he was sure Bioscience was busy trading the funds. (*See* Reply 12; MSJ 22.) Goyette also seizes on the July 16, 2019 transaction involving a company called CETC, and additional subsequent transactions using Henley's funds, to argue that Henley consented to the use of the funds. (*See* MSJ 7–8, 11, 21–23; Reply 12–13.) However, Butler testified that neither Parker nor anyone at Bioscience told Henley that the funds were disbursed from the escrow. (*See, e.g.*, Butler Dep. Tr. 77:4–80:4 (explaining that the deal "was that, when they were closing, they required money in escrow, and it would never leave the escrow account, similar to the deal with Goyette[]"); *id.* 97:3–13 (explaining that he had assumed that none of the funds had been used because he had not heard back from Goyette and this was because "the nature of the business was that the funds were held in escrow[]").) Additionally, Parker testified that he did not ask for Henley's permission regarding any of the July transactions. (*See* Parker Dep. Tr. 120:6–17; 131:17–132:8.) Parker also agreed that his "best recollection now" was that he did not need to tell Henley about the funds already being disbursed by the time Butler emailed Bioscience on July 31st because Parker thought he could recoup the money and because he thought it best to not tell Henley bad news so soon into the relationship. (*See id.* 165:2–21.) Moreover, there is an email from Butler to Parker, Kay, and Goyette, where Butler asked Parker to instruct Goyette to wire him "$25,210 from the funds held by Paul Goyette to [his] order." (Parker Dep. Tr. Ex. 6, at 1–2 (bates stamped PLTF 0009 through PLTF 0010).) This email suggests that Henley thought that using the money required additional instructions, and that the funds were still in Goyette's escrow. A question of fact thus exists whether Henley consented to the use of the funds, and summary judgment on this basis is inappropriate.

For these reasons, the Court DENIES Goyette's Motion for Summary Judgment on the first cause of action for conversion.

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CONCLUSION

For the reasons set forth above, the Court DENIES Goyette's Motion for Summary Judgment (ECF No. 35).

IT IS SO ORDERED.

Dated: **September 28, 2023**

Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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